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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177301
Party	Defendant Charmaine V. Jones
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ORIGINAL

IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE BEFORE THE TRADEMARK
TRIAL AND APPEAL BOARD

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In the matter of Trademark Application
Serial No. 76/529,077
Published in the Official Gazette
(Trademarks) on May 8, 2007

CAKE DIVAS,

Opposer,

-against-

CHARMAINE V. JONES,

Applicant.

Opposition No. 91177301
----- x

90 Park Avenue
New York, New York

October 1, 2009
2:30 p.m.

DEPOSITION of ASHBELL J. McELVEEN,
held at the offices of Foley & Lardner, LLP,
before Fran Insley, a Notary Public of the
States of New York and New Jersey.

ELLEN GRAUER COURT REPORTING CO. LLC
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23 CHARMAINE JONES
24
25

xxxxxx

1 ----- I N D E X -----

2	WITNESS	EXAMINATION BY	PAGE
3	ASHBELL J. McELVEEN	MS. SEGALL	4

4

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6 ----- E X H I B I T S -----

7	EXHIBIT	DESCRIPTION	I.D.	IN EVID.
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8	Exhibit 1	A screen shot	9	13
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9		of the home page		
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10		of foodstop.com		
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11

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13 (EXHIBITS TO BE PRODUCED)

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P R O C E E D I N G S

A S H B E L L J. M c E L V E E N,
having been first duly sworn by the
Notary Public, was examined and
testified as follows:

EXAMINATION BY

MS. SEGAL:

Q. Just a few points when we start.
Remember, that's the court reporter and that
she can only record your responses if you say
them aloud.

A. Exactly.

Q. Any sort of nods or shaking of the
head will not be recorded.

 If I don't say something in a manner
that you understand it, please feel free to ask
me to clarify.

A. Okay.

Q. If you could just state your name
for us.

A. Ashbell J. McElveen.

Q. Where do you live?

A. I live in Brooklyn, New York.

Q. Could you please describe for us
what you do as an occupation?

1 McELVEEN

2 A. I am an executive chef.

3 Q. Where do you work?

4 A. I work at Brooklyn Label Restaurant
5 in Brooklyn.

6 Q. Is that a restaurant that you own?

7 A. No, I'm not the owner.

8 Q. What did you do before that?

9 A. I owned a restaurant in London.

10 Q. What time period was that?

11 A. That was from '80 -- excuse me --
12 2002 until 2007.

13 Q. Could you tell us a little bit about
14 what you did prior to 2002?

15 A. I was in New York, a caterer and a
16 television personality.

17 Q. Tell us what it means to be a
18 television personality.

19 A. Well, I did cooking and food style
20 information on the Weekend Today Show and on
21 Lifetime and currently do it on the BBC.

22 Q. And your position with the Today
23 Show, what time period was that?

24 A. That was from 1990 until '93, and I
25 was on air every Sunday morning for the Sunday

McELVEEN

Morning Weekend Today.

Q. What did you do on that show?

A. I prepared recipes, did food demos and talked about the eclectic food in New York.

Q. Did there come a time that you decided to develop a web site?

A. Yes.

Q. Can you explain to us what that process entailed?

A. Yes. Well, it came to a point where I quit the Weekend Today Show and literally went right after that into putting up a web site, and within two weeks of quitting NBC I had foodstop.com.

Q. What was foodstop.com?

A. Foodstop.com was meant to be a nascent food channel.

Q. Can you describe a little bit what that meant?

A. What that meant was that I thought the Food Network which was on television at the time was not representative of food in America and not the food that I saw, didn't have any color and it didn't have any kind of eclectic

1 McELVEEN

2 personalities. It was pretty bland, so that
3 was my attempt to raise money to fund a
4 competition for the Food Network.

5 Q. How did you go about developing your
6 web site at foodstop.com?

7 A. Well, I reached out to friends and
8 associates and started asking certain friends
9 and associates to contribute to the site, and
10 what I was looking for specifically was that --
11 people that had good general knowledge and big
12 personalities.

13 Q. How did you technically get the site
14 up and running?

15 A. Well, I worked with a company called
16 Cool Code, who at the time was developing site
17 platforms for Time Warner and NBC, and they did
18 this. This was their charity work.

19 Q. Can you explain what you mean by
20 that?

21 A. Well, I didn't have the money to pay
22 the prices that NBC and the other companies
23 were paying developers at that time, and they
24 took on FoodStop and basically charged their
25 clients extra to do that as a charity.

1 McELVEEN

2 Q. What was the web address for this
3 web site?

4 A. WWW.foodstop.com.

5 Q. Who owned that domain name?

6 A. I did.

7 Q. In your own personal name?

8 A. Yes.

9 Q. Who designed the look of the web
10 site?

11 A. That particular look was designed by
12 Cool Code.

13 Q. Who controlled the content that was
14 on the web site?

15 A. I controlled the content.

16 Q. When did the web site go live?

17 A. It went live, to my best
18 recollection, early '94, early '94, late '93,
19 yes.

20 Q. Is there something you are using to
21 help you figure out what that time frame is?

22 A. Well, I'm jogging my memory.

23 Q. Do you still operate that web site?

24 A. No.

25 Q. What happened?

1 McELVEEN

2 A. Actually, I allowed the ownership of
3 the web site to collapse, and actually it was
4 only a short period or two-week period, and at
5 that time another company came in and got the
6 name.

7 Q. Do you remember what time frame this
8 was that this happened?

9 A. That was late 2002 or 2003.

10 Q. I'm going to show you a document
11 that was produced by the applicant in this case
12 as CD205. I would like you to take a look at
13 it.

14 MS. SEGALL: I would like to mark it
15 as Exhibit 1.

16 (Whereupon a screen shot of the home
17 page of foodstop.com was marked as
18 Exhibit 1 for identification, as of this
19 date.)

20 Q. Can you tell us what this document
21 appears to be?

22 A. This appears to be a screen shot of
23 the home page of foodstop.com.

24 Q. How do you recognize it? What are
25 you using to recognize it?

1 McELVEEN

2 A. Because I produced all of the
3 content on here, wrote everything, so I know
4 what I wrote.

5 Q. Was there a time that somebody asked
6 you if you could provide this printout of this
7 web page? Did somebody ask you -- strike that.
8 I'll start over.

9 Are you aware of the subject matter
10 of the proceeding that we are taking this
11 testimony for?

12 A. Yes.

13 Q. Can you describe to us what your
14 understanding of the proceeding is?

15 A. My understanding is that there is an
16 issue of the use of the name Cake Diva.

17 Q. Do you know one of the parties to
18 the dispute?

19 A. Yes, I do.

20 Q. Who is it that you know?

21 A. That is Charmaine Jones.

22 Q. Has Charmaine Jones discussed the
23 dispute with you?

24 A. Not really in detail. She did ask
25 for my help.

1 McELVEEN

2 Q. What kind of help did she ask you to
3 provide?

4 A. She asked me to provide the
5 documentations that she would naturally think
6 that I would have, which would be shots of the
7 site.

8 Q. Did you have shots of the web site?

9 A. Well, I have the whole site
10 electronically, but it's on a file in storage,
11 and I started asking around to other friends
12 and this is what I got back.

13 Q. Who did you get it from?

14 A. I got this from Dennis Williford.

15 Q. Can you tell us who he is?

16 A. He was the photographer on Food
17 Stop.

18 Q. What was his job as a photographer?

19 A. His job was to take food shots, and
20 we would go to food events and he would make --
21 have documented photographic documentation of
22 Food Stop.

23 Q. Was that your only connection with
24 him as the photographer for Food Stop?

25 A. He later became a friend, but

McELVEEN

initially he started out as the photographer.

Q. Is it your understanding that he keeps a catalogue of his photographs?

A. Yes.

Q. And of other pictures related to you?

A. Yes.

Q. And to the Food Stop web site?

A. Yes.

Q. Is it your understanding that this printout came from his collection?

A. Yes, it did.

Q. Would you say he keeps this collection as part of his business records?

A. Yes. As a part of his business records, he keeps a record of every single shot that he takes.

Q. How did he -- how did you receive this web page?

A. I received it by e-mail.

Q. And then what did you do with it?

A. I immediately forwarded it to Charmaine's attorneys.

Q. Does this print outlook like the

1 McELVEEN

2 same document that you received from -- what
3 was his name, Mr. Williford?

4 A. Dennis Williford, yes.

5 Q. I'm sorry. So this looks the same
6 as the document you received from
7 Mr. Williford?

8 A. Yes, absolutely.

9 Q. Does it look to be the same document
10 that you then forwarded to Charmaine Jones'
11 attorneys?

12 A. Yes.

13 Q. Does it look to you to be a true and
14 accurate representation of the web site you
15 operated at foodstop.com?

16 A. Yes, it does.

17 MS. SEGALL: I would ask that this
18 be admitted into evidence as Exhibit 1.

19 (Whereupon Exhibit 1 for
20 identification was received as Exhibit 1
21 in evidence, as of this date.)

22 Q. Looking at the document more
23 closely, can you tell us what time frame this
24 document is from?

25 A. This document is -- the time frame

1 McELVEEN

2 is probably -- it's got some things from '95 on
3 it, I'm sure, but it's mostly '95, '96.

4 Q. How can you tell that from looking
5 at it?

6 A. I can tell by looking at the --
7 there is the Atlanta report, and I went to
8 Atlanta with two other people, including Dennis
9 Williford, the photographer, to photograph and
10 document the food and lifestyle of Atlanta
11 around the olympics.

12 Q. What about the bottom of the page do
13 you see where it says, "Copyright," and there
14 is a copyright symbol, a 1996?

15 A. Yes.

16 Q. Who put that there?

17 A. I did.

18 Q. Can you explain what it meant to you
19 when put there?

20 A. It meant that the information was
21 proprietary, and although I didn't register the
22 trademark, it meant that this information was
23 not freely formed and just made for somebody
24 else to copy and use.

25 Q. What about the date 1996? Why did

McELVEEN

you choose that?

A. Because it was 1996.

Q. Fair enough.

Turning to the top of the page on the right-hand side, you see it says, "October"?

A. Yes.

Q. Can you tell us why it says that?

A. I have appeared on Lifetime Television on several occasions, and this was one of those occasions.

There was a feature on Food Stop when I was appearing on a TV show that there would be a blurb in a TV box that we situated in the right, top right-hand corner of the home page.

Q. How often did you update this web site?

A. Generally about every four weeks, but if there was more pressing and salient information, it got updated more regularly.

Q. On the left side of the document you'll see five rectangles.

A. Yes.

1 McELVEEN

2 Q. Can you tell us what you see in the
3 first rectangle?

4 A. "Chef Ashbell Cooks On The Road."

5 Q. What was the purpose of that
6 rectangle?

7 A. I had just gone off to Jamaica to do
8 a film situation about food and culture in
9 Jamaica, and that was a direct result of being
10 on television in New York. So that was the
11 first pick to let people know about Ashbell On
12 The Road outside of New York.

13 Q. If people were interested in that
14 rectangle, could they do something to find more
15 information?

16 A. Yes, they could click on that
17 rectangle and find out where Ashbell was
18 cooking on the road.

19 Q. Now, are all of rectangles, were
20 they all links?

21 A. Yes, they were all links.

22 Q. The second rectangle, what does that
23 rectangle say?

24 A. That is, "Wines and Spirits," by
25 Darrin Siegfried, who is a master sommelier and

1 McELVEEN

2 vice president of The American Sommelier
3 Society. What he did was educate the users on
4 wines and spirits.

5 Q. If someone clicked on that
6 rectangle, would something happen?

7 A. They would get to a bio of Darrin
8 and then his suggestions or holiday,
9 particularly holiday time, holiday meals, how
10 to uncork champagne and how to keep it, pour
11 it, how to pour wine. Those are typical
12 features from Darrin's site.

13 Q. Then skipping to the fourth
14 rectangle down, can you tell us about that?

15 A. That is Chef Scott Cohen, who was
16 chef at a hotel in New York, and he did healthy
17 recipes.

18 Q. Then the final rectangle on the
19 bottom?

20 A. That was a book put together by
21 Wendy Diamond, who got all of these recipes
22 from famous singers and musicians and
23 chronicled the recipes in a book, and we
24 featured that book and sold that book on Food
25 Stop, and that's why that was there. So we

1 McELVEEN

2 have selective recipes from selected artists
3 featured on the click-through from that main
4 page click.

5 Q. You say you sold the book on the web
6 site?

7 A. We sold the book, yes.

8 Q. How did people order the book?

9 A. Well, they contacted us and Wendy at
10 the same time, so we both knew what was
11 tracking, and then the book was sold and we got
12 a commission on each book.

13 Q. And they contacted you how?

14 A. E-mail.

15 Q. And how would they get your e-mail?

16 A. It was through the click. When you
17 clicked through and you wanted to -- after
18 looking at the recipes you wanted to buy that
19 book, there was a separate book that tracked to
20 Wendy Diamond's e-mail and mine, which then I
21 could track who bought what.

22 Q. There is an e-mail --

23 MR. LILA: I'm going to object to
24 these references to other parts of the web
25 pages under best evidence. It's my

1 McELVEEN

2 understanding that these files are
3 available somewhere but not here today.
4 Is that what we are going over here?
5 Because all I have is the home page of
6 this web site, and now we are referring to
7 other parts of this web site.

8 Has someone kept the other
9 documents, the other pages of this web
10 site as it has been changed through the
11 years?

12 MS. SEGALL: We do not have access
13 to that web site.

14 MR. LILA: Does anyone have it?

15 MS. SEGALL: I don't know the answer
16 to that.

17 MR. LILA: It just seems that these
18 were unavailable. It didn't sound to me
19 that he said they were some part of
20 storage, depending on what we interpret as
21 unavailable.

22 I'm just going to object to
23 everything that -- references that are not
24 on this page, referring to this web site.

25 MS. SEGALL: Well, he can certainly

1 McELVEEN

2 testify to his recollection of what was --
3 what happened and you can certainly make
4 your objection as to the evidence at the
5 appropriate time, but we are going to
6 continue.

7 MR. LILA: That's fine.

8 Q. Was there a link on the site to an
9 e-mail address from the home page?

10 A. Yes.

11 Q. Where did that link take you?

12 A. That link came to -- was a form, and
13 the e-mails actually came to my personal
14 e-mail.

15 Q. Did you receive e-mails through this
16 web site?

17 A. Yes, I did.

18 Q. And were they all directed to you
19 personally?

20 A. No.

21 Q. Who else would you receive e-mails
22 for?

23 A. From various -- if there were
24 e-mails about wines and spirits, they got -- we
25 rerouted to Darrin Siegfried. If there were

McELVEEN

e-mails about Cake Diva, they got rerouted to Charmaine Jones.

Q. Let's talk about the third rectangle down.

A. Okay.

Q. What does that rectangle say?

A. "Cake Diva."

Q. Is there anything else in that rectangle about Cake Diva?

A. Well, there is an image of the cake, a stylized image of a cake.

Q. Did you create that image?

A. No, I didn't. Cool Code created that.

Q. What would happen if somebody clicked on that link?

A. Yes, it came to the information page, and it was an intro to Cake Diva and a title bar which had Food Stop on one side and Cake Diva on the other and a click to Cake Gallery.

Q. What was the Cake Gallery?

A. The Cake Gallery was just photographs of the cakes that Charmaine had

McELVEEN

created.

Q. Is there any other information on that page?

A. Yes, there was. There was a phone number listed at the bottom.

Q. Whose phone number was that?

A. It was Charmaine's, I guess her business phone, her personal phone. It was her number.

Q. Do you recall receiving e-mails through the Food Stop web site?

A. Yes.

Q. Do you recall if they were intended for or about Cake Diva?

A. Yes, because they would ask. I received about thirty or so e-mails in the period of '96 that I recall that specifically wanted, "How do you get in touch with Cake Diva, and how do I get a cake?"

Q. How would you answer those e-mails?

A. I would actually send them to Charmaine, and at the time she didn't have e-mails, so I would have to physically call her and say, "This person with this number is

McELVEEN

trying to get you."

Q. Do you recall as to all of the e-mails that you received through the foodstop.com web site if they were from any particular region in the United States?

A. No, because we were literally like the web global, so it got a certain amount of hits from Western Europe and then the United States also, but they were pretty kind of spread out, and that's what the tracking showed us is that they were pretty spread out.

Q. When you say tracking, what are you referring to?

A. Well, there was a tracking device on the site that could tell where the unique visitors came from.

Q. What did that tracking device show?

A. It showed that we had a wide reach of food on the net, and that's what I wanted.

Q. Going back to some of the things you said, you mentioned a Cake Gallery on the click-through?

A. Yes.

Q. Can you describe again what the Cake

McELVEEN

Gallery depicted?

A. The Cake Gallery depicted cakes that Charmaine had designed and I guess sold, because they were pictures that she had done for clients, taken pictures of the work she had done, and for us that was primary, just to have beautiful pictures there, and that's what the Cake Gallery was, beautiful pictures of work that she created.

Q. Aside from the Cake Gallery on the web page, do you remember what other text there was on the web page?

A. Yes, because -- well, as I described, a bar up top with the Cake Diva logo and the Food Stop logo on one side. The bar on the top of the page had the Food Stop logo and the Cake Diva logo on the other side, so everybody would be oriented on to what page you were on on the site, and that was the reason we did that.

Q. You also mentioned contact information?

A. Yes. There was some contact information.

1 McELVEEN

2 Q. Do you recall what that said?

3 A. It said, "For more information,"
4 something to the effect, "For more information
5 contact Cake Diva at."

6 Q. And that was followed by?

7 A. 212 or a 718 or 201 number. It was
8 one of the two, or maybe it was both. I don't
9 know.

10 Q. How did you decide to include the
11 Cake Diva on your web site?

12 A. Well, I met Charmaine and didn't
13 have an association with her making cakes.
14 When I was at a social event where one of her
15 cakes was there, I was quite surprised, and the
16 response at the party to the cake was
17 tremendous. So I knew her anyway. When I
18 found out that she was producing these
19 incredible cakes, I wanted that visual image on
20 Food Stop.

21 Q. Do you recall when that visual image
22 first appeared on Food Stop?

23 A. It had to be -- well, it was right
24 at the beginning of the site in '93, '94.

25 Q. Was it still there in, I think you

McELVEEN

said 2002, when the site went down?

A. There was -- a link to the site had evolved and Charmaine had her own Cake Diva site, and so we kept the link, and the click-through went to directed to Charmaine's site.

Q. Was there any period of time between '93, '94 and 2002 when Cake Diva did not appear on your web site?

A. As long as the site was up, there was always a click to Cake Diva, and in the archival information there was much more information.

If you went back in the archives then, there would be major pages with the logos of Cake Diva on it as click-through, but that was only in archival stuff, but nothing was on the home page after she had her own web site.

Q. You mentioned thirty e-mails in 1996. How about after that?

A. Probably, hard to kind of -- we were basically a recipe site, food information recipe site. Even at a musical feast you could get a recipe. Scott had recipes. Darrin had

McELVEEN

1 recipes for cocktails, et cetera. I had
2 recipes on the road.

3 I would get lots of e-mails asking
4 for, "I want to make that cake at home. Where
5 is the recipe? How do I do it?"

6 And I would always -- there was a
7 lot of them, and so much so that it almost
8 became my junk e-mail, asking for recipes,
9 because she was clearly selling the cakes and
10 that was her livelihood, so she was not going
11 to give out recipes of how to make a sugar
12 flower.

13 Q. Aside from the web site, what other
14 interactions, if any, did you have with
15 Charmaine Jones as the Cake Diva?

16 A. Well, as the Cake Diva, whenever I
17 was on the Weekend Today Show on NBC I actually
18 brought her on, not on air personally, but her
19 cake was one that we did for a Thanksgiving
20 show.

21 Charmaine made a cornucopia cake.
22 It is a huge cornucopia with all of the autumn
23 vegetables and stuff, leaves. It was
24 absolutely stunning, and that was the lead-in
25

1 McELVEEN

2 to that Sunday show from my segment, and the
3 show teased with the cornucopia.

4 Q. Did you work together on other
5 occasions?

6 A. Yes, we did several events together,
7 and one was written up in the New York Times.
8 It was a reenactment of a couples' wedding
9 reception who had escaped slavery and they
10 never had a wedding reception, and so Juliette
11 McGuinness Nelson, who pulled together with the
12 Schaumberg Library a dinner in which I cooked
13 the food and Charmaine made the cake, so a
14 proper reception was given to the couple.

15 Q. Do you recall about what year that
16 was?

17 A. That it had to be around '92, '93.
18 I'm fuzzy on those dates right now, but it's
19 available through The Times.

20 Q. Did you work together on other
21 occasions?

22 A. Yes. I mean, when I needed
23 something extraordinary and totally different,
24 I called Charmaine, and one occasion I was
25 doing a dinner party for the pre-wedding supper

1 McELVEEN

2 for a big producer for Wesley Snipes, and it
3 was in the home of a friend, and I wanted
4 keepsakes to -- for the people to take away.

5 So I called up Charmaine and I asked
6 her to make fantasy flowers, and she did. For
7 every single place setting there was a fantasy
8 flower there.

9 I took the liberty of putting two of
10 those fantasy flowers under the bed, who is now
11 a friend, but I didn't know her at the time,
12 just using her apartment. She was in Tokyo at
13 the time, and so now we are great friends, and
14 actually the three of us are, and it was
15 because of those sugar flowers. Basically it
16 was the connection.

17 Q. When did you first become aware of
18 the term "Cake Diva"?

19 A. With Charmaine.

20 Q. Can you put that into a time frame?

21 A. Well, early on Charmaine showed
22 me -- it was a one-page something that she had
23 written about her car, which she had nicknamed
24 Baby Huey. It was a big, ugly, old,
25 dilapidated station wagon and I mean ugly,

McELVEEN

ugly, and she nicknamed it Baby Huey because it was as big as a whale or something.

And she had written this thing that said -- and it said the adventures of Cake Diva, and it was just stories about how she delivered these cakes to these fabulous houses in Baby Huey, and I thought it was fantastic, so I said that is what I want. That's the first time really that I heard Cake Diva.

Q. Were there other instances where you saw the term "Cake Diva" in connection with Ms. Jones?

A. Yes. I delivered a cake when Charmaine was out of town to a Masonic hall where there was a wedding to be going on later, and she gave me cards to leave there.

I put -- I set up the cake, and I had a little diagram that she had had and a tray of sugar flowers to be placed at specific spots on the cake. I did what she did, and I put the cards next to the cake.

Q. What did those cards look like?

A. They -- there was an image of Charmaine in a wig as Cake Diva, in this big

1 McELVEEN

2 blonde wig and very nicely dressed and looking
3 extravagant, and "Cake Diva" was on the card.

4 Q. The words "Cake Diva"?

5 A. Yes.

6 Q. Was there contact information?

7 A. It was her phone number. It was
8 outrageous cakes, the Cake Diva and her phone
9 number. I believe there was a New York and a
10 New Jersey phone.

11 Q. Do you have some recollection of
12 what time frame this would have been?

13 A. It's got to be '95. It's got to be
14 1995. I hedge to say '94, '95, but my
15 recollection is probably more '95.

16 MS. SEGALL: We are going to take a
17 minute break because I think we are close
18 to being finished.

19 (A recess was taken from 3:15 p.m.
20 until 3:18 p.m.)

21 Q. We just want to go over one thing,
22 and then we will be finished from our end.

23 I want to go back to the web site,
24 the foodstop.com web site, and to the point in
25 time where Cake Diva developed her own separate

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web site.

A. Yes.

Q. When the web site initially went live, the rectangle that says, "Cake Diva," could you explain once more what that did?

A. That clicked to featured pages on foodstop.com. On those featured pages was a title bar, the Food Stop logo and the Cake Diva logo, and it was information by Charmaine which I wrote as an introduction to Cake Diva, and there was a click-through to the cake art gallery.

Q. Did there come a point in time later when that setup changed on the web site?

A. Yes, that setup changed when Charmaine got her own site.

Q. How did that affect the home page?

A. Well --

Q. Let me rephrase that.

How did that affect the foodstop.com home page?

A. The foodstop.com home page then shifted Charmaine to the click bar on the bottom of the page, and Cake Diva became a

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2 click-through from the bottom of the page.

3 It was still on the home page but
4 wasn't on the feature section. We had at that
5 time other features and other stories that
6 would take up that spot.

7 Q. So at the point in time when she got
8 her own web site, the only reference to Cake
9 Diva on your web site was the click-through at
10 the bottom?

11 A. There was a click-through on the
12 bottom on the new page, but on archival pages
13 there were plenty of click-throughs to all of
14 the information on the site, but on the
15 applique that Cake Diva left we developed other
16 story lines and personalities, but kept Cake
17 Diva as a click-through because for us it was
18 an important bit of programming.

19 Q. Do you recall how long the Cake Diva
20 rectangle appeared on the Food Stop web site?

21 A. That had to be it changed, too, from
22 a rectangle to the outline of the cake that
23 said, "Cake Diva." That stayed. It had to be
24 two or three years that that was there.

25 MS. SEGALL: I think we are done.

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2 Did you have any cross?

3 MR. LILA: I do have some cross.

4 Did you want to take a break?

5
6 EXAMINATION BY

7 MR. LILA:

8 Q. Let me introduce myself again. My
9 name is Ben Lila. I'm the attorney for Leigh
10 Grode and Jones Spitler, the Cake Divas, as
11 they are called. You can call me Ben. I just
12 have a few questions. I don't want to take any
13 more of your time.

14 Referring first to this Food Stop
15 web site, which you mentioned was somewhere
16 between 1993 and 2002, this front page as we
17 are seeing it on CD000205, did the layout of
18 that page change much over that time?

19 A. Did the layout change over time?

20 Q. Yes. Like, I know that individual
21 images and texts might have changed over that
22 time, but the way this page is laid out, is
23 this essentially how it looked like throughout
24 that period?

25 A. Well, essentially there was always

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on Food Stop a left-hand click bar, and that's why we kept that and left the other space fairly open, so it can be dedicated to features like this. So generally this was the setup with the pages on Food Stop.

Q. Do you know, do you recall about what dates the Cake Diva saw that the third rectangular button was removed from the featured side, around what date or year?

A. No, I really don't recall, because by the time Charmaine got her own site, we were full-fledged producing content, and it was just no longer new and just a few people to manage.

Q. Would it be fair to say that it was around the time where the Cake Diva, her own web site was launched, around that time?

A. Yes, it would be fair to say, yes.

Q. I'm a bit curious about the page that appeared when you clicked on this rectangle for Cake Diva. I have objected, of course, to it not being here and that we can't see it, but pulling from your recollection, you mentioned that on that page there was a biography written by you and then a link to

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2 another page which had the Cake Gallery photos;
3 is that correct?

4 A. That's correct.

5 Q. Was there any way to buy anything on
6 any of these web pages, any kind of order
7 taking interface or a way to actually purchase
8 the cakes?

9 A. No, the only thing that we had --
10 any kind of purchase agreement with was with
11 the cookbook Musical Feast.

12 Q. And then there was a phone number
13 and e-mail on the gallery. Did I hear you
14 correctly?

15 A. Yes, it was a phone number. No
16 e-mail.

17 Q. It said -- the text next to the
18 phone number was about getting in touch with
19 Charmaine Jones; is that correct?

20 A. No, the text next to the phone
21 number was for information about Cake Diva
22 cakes, and it was a New York number and a New
23 Jersey number, if I recall.

24 Q. Was there anything on that page that
25 said the cakes displayed were on sale?

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2 A. No, because we weren't selling the
3 cakes.

4 Q. How did this Food Stop web site that
5 you produced, how did you intend to generate
6 income from this web site? You said that you
7 were looking into competing with Food Network;
8 is that correct?

9 A. Well, it was nascent food channel,
10 and what I did and I can still produce those
11 documents, actually, was business plans that
12 related to that and raising money during the
13 dot.com era to make this a television channel.
14 That was the idea.

15 Q. So the web site itself didn't
16 generate incomes -- excuse me. Strike that.

17 The purpose of this web site wasn't
18 to become a place where people sell or these
19 people featured sell products or services?

20 A. Not at this time.

21 Q. Was it at any time a web site where
22 people were --

23 A. Later we sold kitchenware and books
24 and kitchen-related products, foodstuff, but
25 through -- as a vendor, through other

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2 operations.

3 Q. When you met Ms. Jones in 1993 at a
4 social event, you saw cakes that she -- cakes
5 and confections that she had produced; is that
6 correct?

7 A. I don't understand what you are
8 asking.

9 Q. When you first met Ms. Jones at a
10 social event that you described earlier, you
11 were able to see her cakes?

12 MS. SEGALL: I'm going to object,
13 because I don't think that accurately
14 characterizes his testimony.

15 Q. Could you again describe the first
16 time you met Charmaine Jones?

17 A. I met Charmaine Jones through
18 another friend years earlier than that,
19 probably around 1990, and through a mutual
20 friend.

21 Later it was -- I discovered that
22 she made cakes, and that's what I described
23 there.

24 Q. When was the first time you saw her
25 cakes?

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2 A. It was probably '93.

3 Q. On any of the cakes she produced,
4 did she have Cake Diva fixed on any of those
5 cakes, fixed as in written on the cake or a
6 label on the cake?

7 A. Well, if you are a bride and it's
8 your wedding, you probably didn't want Cake
9 Diva to have her logo on your wedding cake, so
10 I didn't see that ever.

11 Q. Have you ever seen it ever on a cake
12 that she has produced?

13 A. I have never seen it on anybody's
14 cake, Joe's Bakery.

15 Q. What about packaging for the cakes?
16 Have you ever seen the Cake Diva trademark
17 appear on packaging for any of Charmaine Jones'
18 products?

19 A. I have not seen that other than what
20 I have described.

21 Q. I'm sorry. You have not seen it on
22 cakes and packaging, correct?

23 A. Well, I was generally not there when
24 Charmaine delivered her cakes, so I wouldn't
25 know what a six-foot-tall castle cake would be

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2 packaged in.

3 Q. Were you ever aware that she created
4 greeting cards, Charmaine Jones created
5 greeting cards?

6 MS. SEGALL: Objection. This is
7 outside the scope of the direct testimony.

8 Q. You can answer.

9 MS. SEGALL: You can answer.

10 A. I don't know about greeting cards,
11 but I remember Christmas cards with gift box
12 cakes on them. I don't know what else she had
13 as a marketing tool.

14 Q. Do you recall if Cake Diva, the
15 words appeared on any of those cards that you
16 recall?

17 A. It appeared on all of the ones I
18 saw.

19 Q. Do you know around what time period
20 that was?

21 A. That was probably from -- it was
22 early, because I was very jealous about the
23 four-colored cards. It was probably around '93
24 at some point.

25 Q. On what occasion did you see these

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2 cards?

3 A. Well, I definitely saw them when I
4 delivered a cake in Charmaine's place at a
5 Masonic lodge, because I put them next to the
6 cake. I don't know if that was appropriate to
7 do, but she handed them to me and I put them
8 there and left.

9 Q. Can you describe the cards?

10 A. Well, as I recall, it said,
11 "Outrageous cakes, the Cake Diva," with some
12 contact details and a photograph of the Cake
13 Diva.

14 Q. Do you remember if the card included
15 a web site of any kind?

16 A. No, it didn't.

17 Q. Have you met Leigh Grode at any
18 time?

19 A. I have no idea who that is.

20 Q. So my next question, have you ever
21 heard of her?

22 A. No, I haven't.

23 Q. What about Jones Spitler? Have you
24 heard or known that person?

25 A. No, I haven't, and I have been in

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2 food a while, so I haven't heard either of
3 those names.

4 Q. Do you know the current name of
5 Ms. Jones' company?

6 A. No, I don't.

7 Q. Did you know the name of her company
8 at any time since 1993?

9 A. I don't know what she has officially
10 as her name of her company. All I know is what
11 I saw on the card, so I have no idea what she
12 filed under or whatever.

13 Q. Are you aware of people who e-mailed
14 into foodstop.com, did they refer to Ms. Jones
15 as Charmaine Jones or did they more commonly
16 refer to her as the Cake Diva?

17 A. They referred to her as the Cake
18 Diva, because that was what was on the site.

19 Q. But her name, Charmaine Jones' name
20 was on the site, too?

21 A. It was, "Charmaine Jones a/k/a Cake
22 Diva." I wrote it myself, so I know what the
23 introduction was.

24 Q. But in the e-mails when people are
25 referring to Ms. Jones --

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2 A. They would not refer to Ms. Jones.
3 They would be -- most of the e-mails referred
4 to either Cake Diva or, "How can I get the
5 cake?"

6 Q. Do you know if any of those e-mails
7 ultimately resulted in sales?

8 A. I have no idea.

9 Q. You mentioned that the Food Stop web
10 site keeps track of web traffic from where
11 various users are coming from? Do you still
12 have a record of that traffic or something that
13 documents who came to the Food Stop web site?

14 A. No, and that was so many generations
15 of tracking software years ago. It's got to be
16 in the dinosaur computer pile. So, no, I don't
17 have that.

18 Q. Was it part of the archive -- once
19 this information was stored, part of the
20 archive pages in the web site?

21 A. Well, I'm not a web designer, but it
22 would be buried in some kind of technical file
23 that I would not know about. That's possible.

24 Q. Is the people, Cool Code, still
25 around?

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2 A. I have no idea.

3 Q. If they are still in business?

4 A. I have no idea if they are still in
5 business.

6 Q. Would you have their contact
7 information?

8 A. I haven't tried to contact them.

9 Q. Do you know where they were based?

10 A. They were based in New York.

11 Q. In New York?

12 A. Yes.

13 Q. And you are also based in New York;
14 is that correct?

15 A. Pardon?

16 Q. You are also based in New York; is
17 that correct?

18 A. I would assume so.

19 Q. I think you were asked earlier
20 whether you were familiar with this proceeding.

21 Have you spoken to anyone about your
22 deposition today before starting today?

23 A. No. Anyone?

24 MR. LILA: Objection. The form is
25 confusing.

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2 MS. SEGALL: I'll rephrase.

3 Q. Did you speak to any person about
4 what you would be talking about today before
5 today?

6 A. No.

7 Q. Have you discussed the general
8 opposition matter with Ms. Jones before today?

9 A. Yes.

10 Q. What did you talk about with
11 Ms. Jones?

12 A. She told me the situation and asked
13 me if I had any information that could help her
14 in the case.

15 Q. How did she describe the situation
16 to you?

17 A. Well, she described the situation as
18 there was someone who was trying to use Cake
19 Diva.

20 Q. And nothing else other than that?

21 A. No.

22 Q. I just have a few more questions,
23 and I think I'm just about done.

24 Since 1993, looking at the Food Stop
25 web site, I notice that the Cake Diva's

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2 trademark was the, space, "Cake," space,
3 "Diva," first letters capitalized.

4 Have you ever observed on the Food
5 Stop web site Cake Diva being all one word?

6 A. I don't recall. I really don't.

7 Q. Do you recall in any context seeing
8 the Cake Diva trademark, do you recall seeing
9 it just as one word and not, "Cake," space,
10 "Diva"?

11 A. I don't recall. I don't recall.

12 Q. Would it be fair to say that -- I'm
13 sorry, please.

14 A. Well, generally at the time people
15 use English semantics which was, "cake," space
16 "Diva." Now with e-mail addresses it's one
17 word, so to which period are you referring?

18 Q. I'll rephrase. I understand.
19 That's fair.

20 In the context, not including e-mail
21 address or web addresses, have you ever seen
22 the use of Cake Divas as all one word on a web
23 page or any of Ms. Jones' materials?

24 A. I really -- I really can't say that
25 I would have seen a space. I would have

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2 recognized Cake Diva because I would read it.
3 If it was one word or two, I would just read it
4 as Cake Diva.

5 Q. Would it be fair to say -- please
6 continue.

7 A. No, I have nothing to add.

8 Q. There is a bit of a delay.

9 Would it be fair to say you have
10 seen the Cake Diva written as two words more
11 often than you have seen it as one word, just
12 over the past from 1993 to 2000?

13 MS. SEGALL: Objection.

14 Q. Are you able to answer the question,
15 or would you like me to rephrase?

16 A. Well, I -- if I saw that, one space
17 or two, I see it as, "Cake Diva."

18 I really don't understand the
19 question you're asking me, actually.

20 Q. So it would be fair to say that when
21 you see the two, you don't distinguish as space
22 or no space in general?

23 A. Pretty much with that, because I
24 know it's Cake Diva for me historically is
25 Charmaine Jones. So whichever way I see it, I

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2 only think of her and what she is creating.
3 MR. LILA: I'm all done.
4 MS. SEGALL: Let's just take one
5 minute to see if we want to do any
6 redirect.
7 (A recess was taken from 3:44 p.m.
8 until 3:45 p.m.)
9 MS. SEGALL: We have nothing
10 further.
11 (Time noted: 3:45 p.m.)
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A C K N O W L E D G M E N T

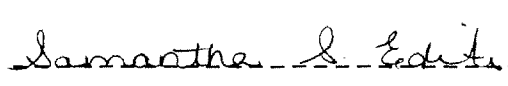
STATE OF NEW YORK :
: ss
COUNTY OF :

I, ASHBELL J. McELVEEN, hereby
certify that I have read the transcript of my
testimony taken under oath in my deposition on
the 1st day of October, 2009; that the
transcript is a true, complete record of my
testimony and that the answers on the record as
given by me are true and correct.



ASHBELL J. McELVEEN

Signed and subscribed to before
me this 6th day of
November, 2009.



Notary Public of the State of New York

SAMANTHA S. EDITE
NOTARY PUBLIC, State Of New York
No. 01ED6068678
Qualified In Kings County
Commission Expires Jan. 14, 2010

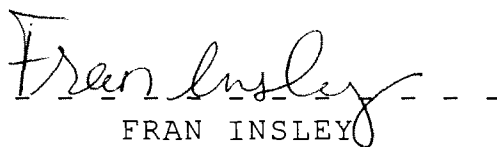
C E R T I F I C A T E

I, FRAN INSLEY, hereby certify that the Deposition of ASHBELL J. McELVEEN was held before me on the 1st day of October, 2009; that said witness was duly sworn before the commencement of testimony; that the testimony was taken stenographically by myself and then transcribed by myself; that the party was represented by counsel as appears herein;

That the within transcript is a true record of the Deposition of said witness;

That I am not connected by blood or marriage with any of the parties; that I am not interested directly or indirectly in the outcome of this matter; that I am not in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of October, 2009.


FRAN INSLEY

ERRATA

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NAME OF CASE: CAKE DIVAS v JONES
 DATE OF DEPOSITION: October 1, 2009
 NAME OF WITNESS: ASHBELL J. McELVEEN

PAGE	LINE	FROM	TO	REASON
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Subscribed and sworn before me

this _____ day of _____, 20__.

 (Notary Public)

 My Commission Expires:

<p>Concordance Report</p> <p>Unique Words: 880</p> <p>Total Occurrences: 2,426</p> <p>Noise Words: 382</p> <p>Total Words In File: 7,422</p> <p>Single File Concordance</p> <p>Case Insensitive</p> <p>Noise Word List(s):</p> <p>NOISE.NOI</p> <p>Cover Pages = 0</p> <p>Includes ALL Text Occurrences</p> <p>Dates ON</p> <p>Includes Pure Numbers</p> <p>Possessive Forms ON</p> <hr/> <p>** 1 **</p> <hr/> <p>1 [8] 1:15; 3:8; 9:15, 18; 13:18, 19, 20; 51:5 10016-1314 [1] 2:14 10022 [2] 1:24; 51:3 126 [2] 1:23; 51:2 12th [1] 50:19 13 [1] 3:8 16870 [1] 2:5 1990 [2] 5:24; 38:19 1993 [5] 34:16; 38:3; 42:8; 45:24; 47:12 1995 [1] 31:14 1996 [4] 14:14, 25; 15:3; 26:21 1st [2] 49:10; 50:5</p> <hr/> <p>** 2 **</p> <hr/> <p>2000 [1] 47:12 2002 [6] 5:12, 14; 9:9; 26:2, 9; 34:16 2003 [1] 9:9 2007 [2] 1:5; 5:12 2009 [6] 1:15; 49:10, 19; 50:5, 19; 51:5</p>	<p>201 [1] 25:7 212 [3] 2:17; 25:7 212-750-6434 [2] 1:24; 51:3 2:30 [1] 1:16</p> <hr/> <p>** 3 **</p> <hr/> <p>338-3529 [1] 2:17 3:15 [1] 31:19 3:18 [1] 31:20 3:44 [1] 48:7 3:45 [2] 48:8, 11</p> <hr/> <p>** 4 **</p> <hr/> <p>4 [1] 3:3 400 [1] 2:5 487-9300 [1] 2:7</p> <hr/> <p>** 5 **</p> <hr/> <p>56th [2] 1:23; 51:2</p> <hr/> <p>** 6 **</p> <hr/> <p>687-2329 [1] 2:17</p> <hr/> <p>** 7 **</p> <hr/> <p>718 [1] 25:7 76/529,077 [1] 1:4</p> <hr/> <p>** 8 **</p> <hr/> <p>8 [1] 1:5 80 [1] 5:11 858 [1] 2:7</p> <hr/> <p>** 9 **</p> <hr/> <p>9 [1] 3:8 90 [2] 1:14; 2:14 91177301 [1]</p>	<p>1:11 91468 [1] 1:25 92 [1] 28:17 92127 [1] 2:6 93 [7] 5:24; 8:18; 25:24; 26:9; 28:17; 39:2; 40:23 94 [5] 8:18; 25:24; 26:9; 31:14 95 [5] 14:2, 3; 31:13, 14, 15 96 [2] 14:3; 22:18</p> <hr/> <p>** A **</p> <hr/> <p>able [2] 38:11; 47:14 absolutely [2] 13:8; 27:25 access [1] 19:12 accurate [1] 13:14 accurately [1] 38:13 add [1] 47:7 address [3] 8:2; 20:9; 46:21 addresses [2] 46:16, 21 admitted [1] 13:18 adventures [1] 30:5 affect [2] 32:18, 21 against-charmaine [1] 1:8 agreement [1] 36:10 air [2] 5:25; 27:19 allowed [1] 9:2 aloud [1] 4:11 america [1] 6:23 american [1] 17:2 amount [1] 23:8 and-dara [1] 2:16 answer [5] 19:15; 22:21; 40:8, 9; 47:14 answers [1]</p>	<p>49:12 anybody's [1] 39:13 anyway [1] 25:17 apartment [1] 29:12 appeal [1] 1:3 appear [2] 26:9; 39:17 appeared [6] 15:10; 25:22; 33:20; 35:20; 40:15, 17 appearing [1] 15:14 appears [3] 9:21, 22; 50:10 applicant [3] 1:10; 2:13; 9:11 application [1] 1:4 applique [1] 33:15 appropriate [2] 20:5; 41:6 archival [3] 26:13, 18; 33:12 archive [2] 43:18, 20 archives [1] 26:15 art [1] 32:12 artists [1] 18:2 ashbell [10] 1:18; 3:3; 4:21; 16:4, 11, 17; 49:7, 16; 50:4; 51:6 aside [2] 24:11; 27:14 asking [6] 7:8; 11:11; 27:4, 9; 38:8; 47:19 associates [3] 2:3; 7:8, 9 association [1] 25:13 assume [1] 44:18 atlanta [3] 14:7, 8, 10 attempt [1] 7:3 attorney [1] 34:9 attorneys [4] 2:4, 13; 12:24; 13:11 autumn [1] 27:23 available [2]</p>	<p>19:3; 28:19 avenue [2] 1:14; 2:14 aware [4] 10:9; 29:17; 40:3; 42:13</p> <hr/> <p>** B **</p> <hr/> <p>baby [3] 29:24; 30:2, 8 bakery [1] 39:14 bar [6] 21:20; 24:15, 16; 32:9, 24; 35:2 based [4] 44:9, 10, 13, 16 basically [3] 7:24; 26:23; 29:15 bbc [1] 5:21 beautiful [2] 24:8, 9 bed [1] 29:10 believe [1] 31:9 ben [3] 2:7; 34:9, 11 bernardo [1] 2:5 best [2] 8:17; 18:25 bio [1] 17:7 biography [1] 35:25 bit [5] 5:13; 6:19; 33:18; 35:19; 47:8 bland [1] 7:2 blila [1] 2:8 blonde [1] 31:2 blood [1] 50:13 blurb [1] 15:15 board [1] 1:3 book [11] 17:20, 23, 24; 18:5, 7, 8, 11, 12, 19 books [1] 37:23 bought [1] 18:21 box [2] 15:15; 40:11 break [2]</p>
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ORIGINAL

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IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE BEFORE THE TRADEMARK
TRIAL AND APPEAL BOARD

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In the matter of Trademark Application
Serial No. 76/529,077
Published in the Official Gazette
(Trademarks) on May 8, 2007

CAKE DIVAS,

Opposer,

-against-

CHARMAINE V. JONES,

Applicant.

Opposition No. 91177301
----- x

90 Park Avenue
New York, New York

October 1, 2009
2:30 p.m.

DEPOSITION of ASHBELL J. McELVEEN,
held at the offices of Foley & Lardner, LLP,
before Fran Insley, a Notary Public of the
States of New York and New Jersey.

ELLEN GRAUER COURT REPORTING CO. LLC
126 East 56th Street, Fifth Floor
New York, New York 10022
212-750-6434
Ref: 91468

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1 ----- I N D E X -----

2	WITNESS	EXAMINATION BY	PAGE
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4

5

6 ----- E X H I B I T S -----

7	EXHIBIT	DESCRIPTION	I.D.	IN EVID.
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8	Exhibit 1	A screen shot	9	13
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9		of the home page		
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10		of foodstop.com		
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11

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13 (EXHIBITS TO BE PRODUCED)

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October 1



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October 27, 2009

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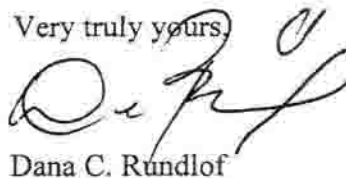
Ben T. Lila, Esq.
Mandour & Associates, APC - Intellectual Property Law
16870 West Bernardo Drive, Ste. 400
San Diego, CA 92127

Re: Cake Divas v. Jones, T.T.A.B. Opp. No. 91177301

Dear Lila:

In accordance with TTAB practice and procedure, attached is a copy of the deposition transcript of Mr. Ashbell J. McElveen, dated October 1, 2009, as well as a copy of the Exhibit introduced at Mr. McElveen's deposition. Please let me know if you have any questions.

Very truly yours,



Dana C. Rundlof

DCR:cm
Attachments